Supreme Court, U.S.
FILED
JUN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1637 (2)

IN THE

Supreme Court of the United States

October term, 1988

STEPHEN DALSHEIM, Superintendent of Downstate Correctional Facility;

ROBERT ABRAMS, New York State Attorney General;

JOHN J. SANTUCCI, Queens County District Attorney,

Petitioners,

against

JAMES INNES,

Respondent.

ANSWER IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ZOILO I. SILVA, ESQUIRE
40-02 Case Street
Elmhurst, New York 11373
(718) 507-2557

12 pp

QUESTIONS PRESENTED

Whether the state denied the accused his right to Due Process by enforcement of the outer limits of a plea bargain because of his breach of the plea agreement rather than permitting him to withdraw his plea of guilty or to have the lower agreed upon sentence imposed as if he had kept his end of the bargain?

Whether the federal court of appeals imposed a greater standard of insuring the constitutional rights of the accused in state criminal proceedings than what would be required in federal proceedings?

PARTIES

The parties to the matter are James Innes; Stephen Dalsheim, Superintendent of Downstate Correctional Facility; Robert Abrams, New York State Attorney General; John J. Santucci, Queens County District Attorney.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties	ii
Table of Authorities	iv
Jurisdictional Statement	1
Opinion Below	1
Constitutional Provisions involved	2
Statement of the case	2
Plea Proceedings	2
Sentence	2
Post Judgment Proceeding	2
POINT ONE	5
THE DECISION OF THE COURT BELOW DOES NOT APPLY A STRICTER CONSTITUTIONAL STANDARD OF DUE PROCESS TO THE COURTS OF NEW YORK STATE THAN WOULD BE REQUIRED OF FEDERAL COURTS.	
Conclusion	7

TABLE OF AUTHORITIES

PAGE

Cases:

Boykin v. *Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) 4

Johnson v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L. Ed. 1461 (1938) 3

Mabry v. *Johnson*, 467 U.S. 504, 509, 104 S.Ct. 2543, 2547, 81 L. Ed. 2d 437 (1984) 4

People v. *Blackwell*, 42 A.D. 2d 973, 348 N.Y.S. 2d 152 (1973) 6

People v. *Carr*, 135 A.D. 2d 722, 522 N.Y.S. 2d 623 (1987) 6

People v. *Chadwick*, 33 A.D. 2d 687, 306 N.Y.S. 2d 182 (1969) 6

People v. *Di Giacomo*, 40 A.D. 2d, 689, 336 N.Y.S. 2d 260 (1972) 6

People v. *Santobello*, 39 A.D. 2d 654, 331 N.Y.S. 2d 776 (1972) 7

People v. *Selikoff*, 41 A.D. 2d 376, 379, 343 N.Y.S. 2d 387 (1973), *Aff'd*, 35 N.Y. 2D 227, 360 N.Y.S. 2d 623, 318 N.E. 2d 784 (1974), *cert. denied*, 419 U.S. 1122, 95 S.Ct. 806, 42 L. Ed. 2d 822 (1975) 6

Ricketts v. *Adamson*, 107 S.Ct. at 2684-86 4

Santobello v. *New York*, 404 U.S. 297, 92 S.Ct. 495, 30 L. Ed. 2d 427 (1971) 3,4

U.S. v. *Giorgi*, 840 F.2d 1022 4

U.S. v. *Fields*, 766 F.2d 1161, 1168 5

U.S. v. *Harvey*, 791 F.2d 294, 300 5

Rule 11 Federal rules of criminal procedure 5,6

IN THE

Supreme Court of the United States

October term, 1988

STEPHEN DALSHEIM, Superintendent of Downstate Correctional Facility;

ROBERT ABRAMS, New York State Attorney General;

JOHN J. SANTUCCI, Queens County District Attorney,

Petitioners,

against

JAMES INNES,

Respondent.

ANSWER IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The respondent opposes the State of New York's request that this court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit granting James Innes' petition for a writ of Habeas Corpus.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was rendered on December 29, 1988. This Court's jurisdiction is invoked under 28 USC 1254(1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 864 F.2d 774. The opinion of the

United States District Court for the Eastern District of New York is reported in 680 F.Supp. 517.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Fourteenth Amendment

STATEMENT OF THE CASE

Plea Proceedings

Indicted for four separate robberies in Queens County, James Innes withdrew his not guilty pleas and entered four guilty pleas in exchange for a sentence of 4 and 1/2 to 9 years concurrent time on all charges. The court conditioned his remaining at liberty and the pleas on three provisions: that he appear for sentence, cooperate with probation authorities and not be rearrested on additional charges. The pleas were accepted and the defendant released to conclude his personal business before sentencing.

Sentence

At sentencing, the court after discovering that the defendant had been rearrested imposed consecutive terms of 7 and 1/2 to 15 years covering the four indictments, a total of 15 to 30 years.

Post Judgment Proceedings

By motion to the Appellate Division of the Supreme Court, Second Department, Innes sought a reduction of sentence to 4 and 1/2 to 9 years; counsel argued that the court not only violated the plea negotiations and the promises but imposed excessive and oppressive sentences in violation of the defendant's right to due process. The Appellate Division reversed the convictions and remitted the case to the sentencing court for imposition of the promised sentence or withdrawal of the guilty pleas.

Upon reargument the Appellate court affirmed the convictions, leave to appeal the decision was denied.

Writ of Habeas Corpus

Innes sought federal habeas corpus relief in the Eastern District of New York. He argued that he should have been permitted to withdraw his plea and that his sentence promise of 4 and 1/2 to 9 years should be enforced. He asserted that conditioning the sentence on his not getting arrested violated his right to due process and the presumption of innocence.

In a memorandum and order Judge Nickerson denied the writ of habeas corpus.

Decision of the United States Court of Appeals reversing the order of the District Court

In a decision rendered by the United States Court of Appeals for the Second Circuit on December 29, 1988 the court reiterated the proper analytical framework for plea resolution. The court found that courts do not indulge in presumptions of waiver of constitutional rights. (*Johnson* v. *Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L. Ed. 1461 (1983)). Plea bargains implicate the waiver of fundamental rights guaranteed to individuals charged with crimes therefor they must be evaluated with reference to the requirements of due process. A defendant may not be held to his negotiated plea of guilty when the promises upon which it was based remain unperformed by the prosecution, *Santobello* v. *New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L. Ed. 2d 427 (1971).

The court found that *Santobello* established a two step framework for evaluating a plea agreement. First, it must be determined precisely what was provided. Next, it must be ascertained whether there was a material breach of the agreement.

Finally, it must be demonstrated that the waiver of rights incident to the plea was the product of defendant's free and intelli-

gent choice, *Ricketts* v. *Adamson*, 107 S.Ct. at 2684-86; *Santobello*, 404 U.S. at 262, 92 S.Ct. at 498. The question of what the plea agreement provided was found to be intimately related to the question of the intelligent and knowing waiver of the defendants rights, *Boykin* v. *Alabama*, 395 U.S. 242-43, 89 S.Ct. at 1711-12. The court determined that under *Santobello's* final step it must be demonstrated that Innes' waiver of his fundamental rights was knowingly and intelligently made with an understanding of the consequences.

The court found that the trial court had not advised the defendant in a straight forward manner that his guilty plea could not be withdrawn in the event of a material breach of the agreement. Nothing was said in the trial judge's admonition that were Innes rearrested he would be unable to withdraw his plea, nor was he told that his guilty plea would stand regardless of whether he was rearrested. Most important he was not told that the state court could and would unilaterally impose an enhanced sentence of 15 to 30 years, rather than the 4 and 1/2 to 9 years discussed during the plea bargaining colloquy.

Said the court, "The validity of a guilty plea is impaired only when its consensual character is brought into question. See *Mabry* v. *Johnson*, 467 U.S. 504, 509, 104 S.Ct. 2543 2547, 81 L. Ed 2d 437 (1984).

In our view, Innes has raised sufficient doubt as to whether his plea was ever accepted, and if it was, whether he was fully and "fairly apprised of its consequences." *id.*

The court found that the provisions of the plea agreement that fix a criminal defendant's term of imprisonment are largely dictated by the state. Because of this and the substantial constitutional interests implicated by plea agreements, the state must bear the burden for any lack of clarity in the agreement and ambiguities should be resolved in favor of the defendant. *United States* v. *Giorgi*, 840 F.2d at 1026 (The government must shoulder a greater degree of responsibility for lack of clarity in a plea agree-

ment."); *United States* v. *Harvey,* 791 F.2d 294, 300 (4th Cir. 1986) (Constitutional. . . concerns require holding the government to a greater degree of responsibility than the defendant. . . for imprecisions or ambiguities in plea agreements.") *United States* v. *Fields,* 766 F.2d 1161, 1168 (7th Cir. 1985) (government has a "duty to use special care in their drafting" of plea agreements).

The court found the plea agreement laden with ambiguity. The court found it impossible to conclude that Innes truly understood that he was waiving his right to be tried on the original charges of first degree robbery, and agreed instead that were he rearrested the state trial court could unilaterally impose a 15 to 30 years sentence upon him.

The court concluded that the defendant was denied Due Process of law by being denied his right to trial by jury.

POINT ONE

THE DECISION OF THE COURT BELOW DOES NOT APPLY A STRICTER CONSTITUTIONAL STANDARD OF DUE PROCESS TO THE COURTS OF NEW YORK STATE THAN WOULD BE REQUIRED OF FEDERAL COURTS.

Rule 11 of the Federal Rules of Criminal Procedure directs the court to conduct an extensive dialogue with the defendant before the defendant's plea may be accepted.

The thrust of rule 11 is to assure that the defendant has made a knowing and intelligent waiver of his constitutional rights. The rule requires that the defendant understand the nature of the charge to which a plea is offered.

Rule 11 subsection (e), (Plea agreement procedure) provides at (4), (Rejection of a plea agreement) that "if the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by

the plea agreement, *afford the defendant the opportunity to then withdraw the plea,* and advise the defendant that if the defendant persists in a guilty plea. . . the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement."

Due Process of law is the cornerstone of American Criminal Jurisprudence. Every criminal defendant is assured fundamental constitutional rights including the right to a fair trial.

Federal courts acknowledge this most important principle. It is witnessed by the language and mandate of Rule 11. The Rule provides that the defendant be afforded an opportunity to withdraw his plea. To provide differently is to authorize a back door sneak attack on defendants and the Constitution itself.

In *People* v. *Selikoff,* 41 A.D. 2d 376, 379, 343 N.Y.S. 2d 387 (1973, *aff'd,* 35 N.Y. 2d 227, 360 N.Y.S. 2d 623, 318 N.E. 2d 784 (1974), *cert. denied,* 419 U.S. 1122, 95 S.Ct. 806, 42 L. Ed 2d 822 (1975), the court said:

While many, if not most, sentence arrangements by the court at the time of a guilty plea are expressly made conditional upon the findings of the presentence report, it is clear that any such arrangement, no matter how phrased, must be considered contingent until such time as it is confirmed by the court, subsequent to its review of the presentence report, by the formal imposition of sentence.

If there is a significant change of circumstances between the plea agreement and the imposition of sentence, the court has the option to either permit withdrawal of the plea or to enforce the sentence as conditionally promised. *People* v. *Selikoff,* supra, 35 N.Y. 2d at 238, 360 N.Y.S. 2d 623, 318 N.E. 2d 784; *People* v. *Carr,* 135 A.D. 2d 722, 522 N.Y.S. 2d 623 (1987); *People* v. *Blackwell,* 42 A.D. 2d 973, 348 N.Y.S. 2d 152 (1973).

People v. *Di Giacomo,* 40 A.D. 2d, 689, 336 N.Y.S. 2d 260 (1972); *People* v. *Chadwick,* 33 A.D. 2d 687, 306 N.Y.S. 2d 182

(1969) *People* v. *Santobello*, 39 A.D. 2d 654, 331 N.Y.S. 2d 776 (1972).

The defendant can not obtain a benefit from his breach of a plea agreement. He can not gain the reduced sentence he bargained for and stands before the state court for trial. The requirement that state courts be clear in plea negotiations and agreements ensure fairness, stabilize and finalize the parties expectations, and reduce the waste of judicial resources required to review challenges to guilty pleas that are encouraged when the record of the plea proceedings is unclear.

The question presented in the petition for certiorari is not new. The Federal courts utilize a standard of Due Process that is neither burdensome to itself or for the State courts to follow. Moreover, it is the appropriate course of action as mandated by the Constitution.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully Submitted,

ZOILO I. SILVA
Attorney for Respondent
40-02 Case Street
Elmhurst, New York 11373